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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 850.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORMACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILLIPP and HUGH B. BAKER,

Petitioners,

—against—

CARL J. AUSTERIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

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—against—

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 127) is reported at 67 F.

Supp. 223. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 142) has not yet been reported.

Grounds of Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 149) reversing a judgment of the District Court for the Southern District of New York (R. 140) comes before this Court on a writ of certiorari granted February 10, 1947 (R. 151). The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

In the absence of diversity of citizenship, does a federal district court, other than the bankruptcy reorganization court, have original jurisdiction over a plenary suit brought by Chapter X trustees against adverse claimants to recover on ordinary common law, or state-created, civil claims for an accounting?

Statement of the Case.

This is a civil suit for an accounting and other relief brought in the Southern District Court of New York. The respondents-plaintiffs are trustees in reorganization proceedings under Chapter X of the Bankruptcy Act pending in the United States District Court for the Eastern District of Virginia for the reorganization of Central States Electric Corporation, a Virginia corporation. The Virginia district court authorized its trustees to bring this suit (R. 4). No "property" in the control of any court is involved.

The petitioners are former directors, officers, stockholders of, or otherwise connected in the complaint with, Central States. The suit is based on allegations of breach of fiduciary duty and waste of assets by the petitioners. The causes of action alleged had accrued to Central States long before the time the reorganization proceedings were begun and are

based on state-created rights. Except for a single transaction which occurred seven years prior to the filing of this suit, all of the alleged misdeeds occurred from sixteen to twenty-eight years prior to the commencement of this action.

Respondents did not allege diversity of citizenship. The complaint rested jurisdiction on the Constitution, Article I, Section 8, Clause 4 and Article III, Section 2; on the Bankruptcy Act, 11 U. S. C.; and on Sections 24(1) and 24(19) of the Judicial Code, 28 U. S. C. §§ 41(1), 41(19) (R. 4).

The constitutional clauses relied on, empower Congress to establish uniform laws on the subject of bankruptcy and extend the federal judicial power to suits involving federal questions or brought by the United States. The sections of the Judicial Code relied on by respondents, implement these constitutional clauses. The specific sections in the Bankruptcy Act on which respondents rely, have been identified by them in the courts below as Sections 2a and 115, 11 U. S. C. §§ 11a, 515, which grant jurisdiction to bankruptcy courts in bankruptcy proceedings and, under Chapter X, afford equity receivership powers to the reorganization court.

Petitioners moved to dismiss the suit for want of jurisdiction (R. 121). The District Court, per Leibell, *D. J.*, granted the motions. (Opinion, R. 127; Order, R. 138; Judgment, R. 140.) The respondents appealed (R. 140) and the Circuit Court of Appeals for the Second Circuit (Judges Swan, A. N. Hand, and Clark) reversed the District Court's judgment and held (Opinion per Judge Clark) that jurisdiction existed under Section 2a(7) of the Bankruptcy Act (R. 142). This section grants original and exclusive federal jurisdiction in "proceedings under" the Bankruptcy Act, to "courts of bankruptcy" "to cause the estates of bankrupts to be collected."

The Issues Raised.

Jurisdiction of this suit by the District Court below depends on whether the Bankruptcy Act or the Judicial Code

express the grant of such jurisdiction. The burden is on the respondents to establish jurisdiction.

Diversity of citizenship is not alleged by respondents. The Judicial Code therefore does not afford jurisdiction unless a federal question is raised because this suit is brought by trustees appointed under Chapter X of the Bankruptcy Act, or this is a suit by officers of the United States within the meaning of Judicial Code, Section 24 (1), 28 U. S. C. § 41 (1). The district court below rejected the claims of jurisdiction under the Judicial Code and the Circuit Court of Appeals failed to pass on this point. It is self-evident that there is no merit in the attempt to predicate jurisdiction on the Judicial Code.

Concededly the Bankruptcy Act affords no jurisdiction unless the Chandler Act, 52 Stat. 842, *et seq.*, added a ground of jurisdiction. Respondents rely principally, not on a statute added by the Chandler Act to the Bankruptcy Act, but on a section in a pre-existing statute, Section 2 of the Bankruptcy Act, 11 U. S. C. § 11, which they say embodied the requisite jurisdiction but was fettered by Section 23 until that was eliminated in Chapter X matters by the Chandler Act. Sections 2 and 23 will be analyzed later to show that they were grants of entirely different kinds of jurisdiction; that Section 23 was not a limitation on Section 2; that Section 2 does not apply to a suit such as this and does not apply to a district court other than the bankruptcy court.

The further claim by respondents of jurisdiction is predicated on the addition to the Bankruptcy Act of Section 115, 11 U. S. C. § 515 which affords equity receivership powers to the reorganization court. However, the district court below is not the reorganization court.

The district court, relying principally upon two decisions of this Court, *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, and *Schumacher* v. *Beeler* (1934), 293 U. S. 367, rejected both contentions based on the Bankruptcy Act. These cases state that Section 2 was a grant of a bankruptcy jurisdiction to the bankruptcy court for bankruptcy

proceedings. Consequently, Section 2 creates no power to entertain a plenary suit at law or in equity brought in a district court other than the court sitting as the bankruptcy court. The district court below likewise related the equity receivership powers under Section 115 solely to the reorganization court. On the point that Section 2 was unfettered in Chapter X matters by the elimination of Section 23 the district court below held that federal jurisdiction is not created or enlarged by inference.

The Circuit Court of Appeals avowedly rejected the authority of this Court's decisions mentioned above. The Circuit Court decided that the interpretations of Section 2 announced by this Court had resulted from a supposed erroneous interpretation by this Court of an earlier case which had passed on the Act of 1867, *Lathrop* v. *Drake* (1875), 91 U. S. 516, or in any event that this Court's interpretations of Section 2 in the cases mentioned were *dicta* not any longer to be followed. The Circuit Court of Appeals held that the enactment of Chapter X had enlarged federal jurisdiction to include as "proceedings" in bankruptcy all plenary suits brought by trustees against adverse parties and that federal jurisdiction thereof can be exercised by any of the district courts of the United States and not solely by the one sitting as the bankruptcy or reorganization court.

The general consequence of the novel holding of the Circuit Court of Appeals is to make the jurisdiction of any federal court exclusive over state-created rights, when asserted by a Chapter X trustee, because such rights are "proceedings" under the Act and, as we show hereafter, all matters and proceedings in bankruptcy are within the exclusive jurisdiction of the federal courts. If the ruling below correctly expresses the law, the federal courts have not had such a large grant of jurisdiction nor has there been such redistribution of power as between state and federal courts since the repeal of the Bankrupt Act of 1867.

We base the argument which follows on the oft-repeated proposition that "bankruptcy courts must administer and

enforce the Bankruptcy Act as interpreted by this Court * * *." *Vanston* v. *Greene (Inland Gas Corporation)*, U. S. , decided December 9, 1946. We rely principally on the interpretation of the Act by this Court in *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, and *Schumacher* v. *Beeler* (1934), 293 U. S. 367, both of which the Circuit Court of Appeals openly disregarded.

Specification of Errors.

We shall urge that no provision of the Bankruptcy Act or of the Judicial Code confers jurisdiction on the District Court. The District Court below is not the bankruptcy (reorganization) court.

The Circuit Court of Appeals erred:

1. In reversing the District Court and sustaining its jurisdiction over this action.

2. In holding that jurisdiction over this action existed under Section 2a(7) of the Bankruptcy Act.

POINT I.

THE BANKRUPTCY ACT DOES NOT CONFER THE REQUISITE FEDERAL JURISDICTION.

The nature of this suit is not in dispute. This is a plenary suit *in personam*. No bankruptcy controversy is involved. No reorganization problem is presented. No "property" of the debtor or under the control or possession of the court is in litigation. *Cf. Mueller* v. *Nugent* (1901), 184 U. S. 1, 14-15. The jurisdiction is not *in rem*. The action is one to account for alleged breach of fiduciary duty and waste of corporate assets, and is one that may be tried only in a plenary suit. *Park* v. *Cameron* (1915), 237 U. S. 616; *Babbitt* v. *Dutcher* (1910), 216 U. S. 102, 113-14.

Jurisdiction of a plenary suit based on state-created rights is not to be found in Chapter X. Nor does Chapter X deal

with any district court other than that in which the reorganization is pending or to which it has been transferred. The shortest answer to the question presented is the very language of the statute.

Chapter X by its terms grants jurisdiction only to that district court where, by reason of the filing of the petition, Section 114, 11 U. S. C. § 514, or the transference to it of the proceeding, Section 118, 11 U. S. C. § 518, it has become the reorganization court.

Chapter X relates solely to proceedings under the reorganization sections and excludes from its scope a controversy involving state-created rights, such as this case. Section 101, 11 U. S. C. § 501, states:

> "The provisions of this chapter shall apply *exclusively* to proceedings *under* this chapter." (Italics supplied.)

The district court below is not the reorganization court nor is this a proceeding under Chapter X or based on federally-created rights.

Accordingly, any search for other sections of the Bankruptcy Act to discover the jurisdiction for which respondents contend must necessarily be futile. Irrespective of this point, jurisdiction can not be spelled out of the Bankruptcy Act.

Chapter X incorporates by reference certain general provisions of the Bankruptcy Act by providing in Section 102, 11 U. S. C. § 502, that:

> "The provisions of Chapters 1 to 7, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this chapter: *Provided, however,* That Section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters 1 to 7, inclusive. * * * "

Thus the sections borrowed from the general Bankruptcy Act are imported to "apply in proceedings under" Chapter X.

No provision is imported into Chapter X which refers to the jurisdiction of an ordinary district court in a suit involving state-created rights or to a controversy other than a proceeding under the Act, and as noted above, no such provision exists in Chapter X. Section 23, 11 U. S. C. § 46, contains the only grant of such jurisdiction, but that is eliminated by command of Section 102.

Section 2 of the Bankruptcy Act, 11 U. S. C. § 11, is the only section dealing with jurisdiction on which respondents rely which is incorporated by reference in Chapter X. But Section 2 deals with jurisdiction of *courts of bankruptcy* in relation to *bankruptcy proceedings*. Bankruptcy proceedings are of a summary nature only.

The Circuit Court of Appeals held that jurisdiction of this action in the Southern District of New York existed under Section 2a(7) of the Bankruptcy Act. It is clear, however, that Section 2a(7) is applicable only to the reorganization court in Virginia. Section 2a(7) applies only to summary proceedings and not to plenary suits such as this, and such summary proceedings may be brought only in the reorganization court, which has exclusive jurisdiction thereof.

A. Section 2a(7) of the Act of 1898 deals only with summary proceedings.

Section 2a(7) of the Bankruptcy Act of 1898, as amended, 52 Stat. 842, 11 U. S. C. § 11a(7), reads:

> "CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act,* in vacation, in chambers, and during

* The only change effected in this section by the Chandler Act was to change the words "bankruptcy proceedings" to "proceedings under this Act." This was done "in order to embrace the new debtor relief sections." Hanna & McLaughlin, The Bankruptcy Act of 1898, as amended, including the Chandler Act of 1938 (1939) 5.

their respective terms, as they are now or may be hereafter held, to— * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *."

In bankruptcy legislation and litigation, "bankruptcy proceedings" or "proceedings under this Act" have had but one denotation: that of summary proceedings. Section 6 of the Act of 1841, 5 Stat. 443, 445, specifically provided that jurisdiction in "bankruptcy proceedings" should "be exercised summarily in the nature of summary proceedings in equity." Section 1 of the Bankrupt Act of 1867, 14 Stat. 517, was based on this concept—"bankruptcy proceedings" under that Act were summary in nature. *Smith* v. *Mason* (1871), 14 Wall. 419; *Marshall* v. *Knox* (1872), 16 Wall. 551. Suits at law or in equity were no part of the bankruptcy proceeding. *Wiswall* v. *Campbell* (1876), 93 U. S. 347. And the same principle was continued when Section 1 of the Act of 1867 was carried over into Section 2 of the Act of 1898. *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, 533; *Schumacher* v. *Beeler* (1934), 293 U. S. 367.

The fact that by Section 2a the court of bankruptcy may exercise its jurisdiction "in vacation, in chambers, * * *" is indicative of a summary, not plenary, jurisdiction. *Smith* v. *Mason* (1871), 14 Wall. 419. Section 2 embodies the grant of jurisdiction over proceedings in bankruptcy. Twenty-one subdivisions enumerate the proceedings covered by Section 2. Each of the 21 subdivisions affords exclusively summary jurisdiction to the bankruptcy court. The Bankruptcy Act did not intrude a plenary jurisdiction into Subdivision "(7)" of Section 2a.

Thus, under Section 2a(7), the bankruptcy court may in

summary fashion deal with a trustee's petition for permission to sue adverse claimants in a foreign district, and by summary determination (as in this case) direct the trustee to sue and thereby "cause" the claim to be collected and reduced to money. Again, when the claim has been reduced to the possession of the bankruptcy court by the trustee, that court may in summary fashion determine any controversies in the bankruptcy proceedings themselves.

The separation between the summary jurisdiction and the plenary jurisdiction of the bankruptcy court is carefully spelled out in the Act itself. In Section 23(a) Congress carefully pointed up the distinction between "bankruptcy proceedings" or "proceedings under this Act" which are summary in nature and other "controversies at law or in equity" which are plenary in nature. These very phrases: "bankruptcy proceedings" and "proceedings under this Act," contradict the respondents' thesis that this case is governed by Section 2. Certainly this suit is not a "bankruptcy proceeding"; but even more evident is the fact that this action is not a "proceeding *under* this Act" for none of the substantive issues involve this statute, nor are any of the alleged rights or causes of action created by this statute.

Congress has recently illustrated this plan of the Bankruptcy Act and its conception of Section 2 as one dealing solely with summary proceedings. In enacting Chapter X (Chandler Act, 1938), by the simple expedient of adding subdivision 21 to Section 2a of the Bankruptcy Act, Congress was able to convert certain suits, formerly plenary, into summary proceedings. *Emil* v. *Hanley* (1943), 318 U. S. 515, 519.

The respondents have heretofore urged that Section 2 of the Act of 1898 should be construed by analogy to the construction placed upon Section 1 of the Act of 1867. Respondents have said that under Section 1 of the Act of 1867 all of the district courts of the United States were held to have jurisdiction, without regard to diversity of citizenship of the parties, of suits to which a trustee in bankruptcy was a party. Respondents have cited *Lathrop* v. *Drake* (1875),

91 U. S. 516, in support. However, this Court has said that the jurisdiction in the *Lathrop* case "was upheld, not under the provisions of section 1 of that act, * * * but wholly under the distinct clause of section 2." *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, at 531:

> "In *Lathrop* v. *Drake* (1875), 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court, * * *. And the jurisdiction of the District and Circuit Courts over suits * * * in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, * * * but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.'"

Mr. Justice Gray writing for this Court in the *Bardes* case then summarized the difference between the jurisdiction in bankruptcy proceedings under Section 1 of the Act of 1867 and the jurisdiction over plenary suits *in personam* under Section 2 of the same Act.

> "Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the Circuit and District Courts of the United States, did not divest or impair the jurisdiction of the state courts over like cases." (p. 533).

The proper interpretation as announced by the *Bardes* decision was followed by this Court thirty-four years later in *Schumacher* v. *Beeler* (1934), 293 U. S. 367, 372.

Respondents have attempted to show that Section 1 of the Act of 1867 embodied a grant of general jurisdiction over plenary suits by trustees on state-created rights and that a grant of similar scope is reflected in Section 2a(7) of the Act of 1898. As the cases show, however, the general grant of jurisdiction in the Act of 1867 was not in Section 1, but rather in Section 2, and was to both the circuit and district courts. Thus the respondents really seek for Section 2a(7) of the Act of 1898 the effect of Section 2 of the Act of 1867. Nothing need be added to the rejection of that argument by this Court in the *Bardes* case (p. 537):

> "The bankrupt acts of 1867 and 1841, as has been seen, each contain a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provision of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

The very argument on Section 2a(7) of the Act of 1898 on which respondents rely to sustain jurisdiction was rejected in the *Bardes* case:

> "The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867 • • •" (p. 535).

The Circuit Court of Appeals nevertheless ruled that the construction of Section 2 of the Act of 1898 by the Supreme Court in the *Bardes* and *Schumacher* cases—the construction

for which we contend—was error. We respectfully submit that the error was not made evident by the opinion of the Circuit Court. It should be noted that apparently no such error was found by Congress to exist. After making its exhaustive study of the Bankruptcy Act of 1898, in preparation for its general revision of that Act in 1938, it made no change in the language of Section 2 to "correct" the interpretation of that section by this Court. It is settled doctrine that congressional reenactment of statutes following interpretative decisions made by this Court, is deemed an acceptance by Congress of such interpretations for purposes of the legislation. *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 488-489.

The Circuit Court of Appeals, in disregard of the Supreme Court's interpretation, held that "proceedings under this Act" or "bankruptcy proceedings" were not restricted to summary proceedings because in other parts of the Act, the word "proceedings" was used with other connotations. The Circuit Court did not, however, emphasize the fact that in three of these four other sections the word "proceedings" is expressly preceded by the adjective "plenary," Sections 60b, 67e, 70e(3), 11 U. S. C. §§ 96b, 107e, 110e(3), and in the fourth, Section 11e, 11 U. S. C. § 29e, the proceeding referred to is not a "bankruptcy" proceeding nor a proceeding "under this Act." This construction is fortified by express provision of the Judicial Code, Section 256, amended, "Sixth," 28 U. S. C. § 371, amended "Sixth." Matters and proceedings "in bankruptcy" are exclusively federal. In contrast, proceedings not "in bankruptcy," Sections 11e, 60b, 67e, and 70e(3), are not exclusively federal.

A further consequence of the Circuit Court's ruling that ordinary suits by Chapter X trustees are proceedings under the Act would be the withdrawal of the historical right of jury trial. The right to a jury trial in bankruptcy proceedings is restricted largely to the issue of insolvency and the commission of acts of bankruptcy. Section 19, 11 U. S. C. § 42; *Elliott* v. *Toeppner* (1902), 187 U. S. 327. Of course, in plenary actions which cannot be brought under Section 2, and in which a trustee happens to be a plaintiff or defendant,

jury trials are available. *Barton* v. *Barbour* (1881), 104 U. S. 126; *Wm. Edwards & Co.* v. *LaDow* (C. C. A. 6th, 1916), 230 F. 378, 381; *In re Russell* (C. C. A. 2d, 1900), 101 F. 248, 251. *Cf. Smith* v. *Mason* (1871), 14 Wall. 419. But, proceedings under the Act are of equitable cognizance, *Pepper* v. *Litton* (1939), 308 U. S. 295, and jury trial is a matter of discretion, *Burnham* v. *Todd* (C. C. A. 5th, 1944), 139 F. (2d) 338; *Shor* v. *McGregor* (C. C. A. 5th, 1939), 108 F. (2d) 421; *In re Rude* (D. Ky., 1900), 101 F. 805; *In re Christenson* (N. D. Iowa, 1900), 101 F. 243. For example, on the construction sought by the respondents, a defendant, a debtor of a bankrupt, in an ordinary suit on a promissory note would lose his absolute right to a jury trial merely by reason of the bankruptcy of his adversary. And as hereafter shown even the same courts would no longer remain open for such contests; sustaining the contention of the trustees would result in federal jurisdiction exclusively over ordinary state-created rights.

B. Jurisdiction under Section 2a(7) is vested exclusively in the reorganization court.

There can be little argument about the fact that the jurisdiction established by Section 2a(7) of the Act may be exercised only in the bankruptcy court.

> "Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto [§ 2a(7)]; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments 'as may be necessary for the enforcement of the provisions' of the act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 217."
>
> *Pepper* v. *Litton* (1939), 308 U. S. 295, 304.

In *United States Fidelity & G. Co.* v. *Bray* (1912), 225

U. S. 205, 217, this Court stated, in an opinion by Mr. Justice Van Devanter:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

Respondents contend, however, that this jurisdiction, limited to the bankruptcy courts, does not restrict the jurisdiction to the court in which the bankruptcy or reorganization proceedings are pending, but includes every federal district court. Their argument would seem to be based on Section 1(10) of the Act, 11 U. S. C. § 1(10), which creates courts of bankruptcy:

> "'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, and the District Court of the United States for the District of Columbia; * * *."

Their argument, however, fails to take into consideration the distinction between a court which is authorized to act as a court of bankruptcy and a court which in fact is acting as a court of bankruptcy. Every federal district court is authorized to act as a bankruptcy or reorganization court; only a district court in which bankruptcy proceedings have been filed is acting as a court of bankruptcy with relation to those proceedings. Sections 1(10), 2, 11 U. S. C. §§ 1(10), 11. This distinction is most clearly spelled out in *Norris' Case* (E. D. Mich., 1870), Fed. Cas. No. 10304, 18 Fed. Cas. 317,

317-18; see also *Operator's Piano Co.* v. *First Wisconsin T. Co.* (C. C. A. 7th, 1922), 283 Fed. 904.

In the *Norris* case, the Court said (pp. 317-18):

> "By section 1 of the bankrupt act the district courts are constituted 'courts of bankruptcy,' with certain general and specific powers and jurisdiction. Courts of bankruptcy, as they existed in England at the time the act was passed, were and still are separate and distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is that here, instead of creating a new organization, an organization already existing, known as the district court, is taken up and made use of in lieu of such new organization. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as district court, than if it were such separate and distinct organization."

A district court other than the bankruptcy court depends for jurisdiction not on the provisions of the Bankruptcy Act, which do not relate to it, but on the provisions of the Judicial Code governing all civil litigation. Judicial Code, Section 24, 28 U. S. C. § 41. The district court's jurisdiction sitting as an ordinary court is the same as if bankruptcy had not intervened.

The District Court for the Southern District of New York in this case was not requested to exercise its bankruptcy powers but was requested to act only within its general non-bankruptcy jurisdiction. Section 2a(7), therefore, did not confer jurisdiction over this action. The order of the Virginia district court authorizing this suit could not invest the district court in New York with jurisdiction (R. 4).

> "Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bank-

> ruptcy it suffices to say that the latter is not at liberty to surrender its exclusive control over matters of administration or to confide them to another tribunal."
>
> *United States Fidelity & G. Co. v. Bray* (1912), 225 U. S. 205, 218.

C. The inapplicability of Section 23 to Chapter X proceedings does not expand the scope of jurisdiction of Section 2.

The only section of the general Bankruptcy Act which does deal with jurisdiction of plenary suits *in personam* such as this one, as distinguished from bankruptcy proceedings, in district courts other than the court of bankruptcy is Section 23, 11 U. S. C. § 46.

Section 102, 11 U. S. C. § 502, of Chapter X makes Section 23 inapplicable to a reorganization proceeding unless an order is entered directing that bankruptcy liquidation be proceeded with.

The respondents contend that Section 2a(7) was a general grant of jurisdiction to the federal courts which was narrowed by Section 23. Therefore, they say that the removal of Section 23 from Chapter X matters unshackled the general grant in Section 2a(7) so as to afford all district courts unlimited jurisdiction of suits by trustees. In support of the contention that Section 2a(7) was a general grant of jurisdiction respondents say that this section was derived from Section 1 of the Act of 1867 which had been construed as such a general grant. Recognizing that this Court has interpreted Section 2a(7) as a grant, not of general jurisdiction, but as a grant of summary bankruptcy jurisdiction not applicable to plenary suits, the respondents have urged that this Court has misapprehended the scope of Section 2a(7) or else reached such interpretations under the limiting effect of the presence in the Act of Section 23.

The contentions of the respondents are invalid. This Court has squarely interpreted Section 23 as an independent grant of jurisdiction. Section 23 appeared in bankruptcy legislation for the first time in the Act of 1898. Its purpose

was to substitute for the general grant of jurisdiction found in Section 2 of the Act of 1867, a sharply restricted grant of plenary jurisdiction. Section 2 of the Act of 1867 finds no counterpart in the Act of 1898 except in the limited substitute of Section 23.

Section 2 of the Act of 1898 was restricted to a grant of bankruptcy jurisdiction to the bankruptcy court over summary bankruptcy proceedings formerly provided for in Section 1 of the Act of 1867.

Two years after enactment of the Act of 1898, this Court so interpreted Sections 2 and 23 of the Act of 1898. *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, 535:

> "The section [2] nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of incidental powers * * *."

Speaking of the general grant of jurisdiction to the federal courts under the Act of 1867 to entertain plenary suits by trustees, this Court in the *Bardes* case, *supra*, said at page 537:

> "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and *substituted* the restricted provision of § 23, it intended that either of those courts should retain the jurisdiction which it had under the *obsolete* provision of the earlier acts." (Emphasis supplied.)

It was clearly understood by this Court that Section 23 was a grant of jurisdiction and not a limitation on the jurisdiction created by Section 2:

> "We think that the exceptions thus established by the amending acts show clearly that it was the intent of Congress that § 23b should operate as a grant of jurisdiction of suits brought by a trustee in bankruptcy against adverse claimants * * *."
>
> Mr. Chief Justice Hughes, in *Schumacher* v. *Beeler* (1934), 293 U. S. 367, 377; see also *id.* at 374.

See also,

Bardes v. *Hawarden First National Bank* (1900), 178 U. S. 524.

The provisions of Sections 23 and 2a(7) and analysis of the legislative history of the Act of 1898 and of the purposes of the sections added in 1938 by Chapter X prove that the district court below has no jurisdiction of this suit under the bankruptcy laws.

Section 23 now provides that all district courts have the same jurisdiction of all controversies at law or in equity, as distinguished from proceedings under the Bankruptcy Act, between receivers or trustees and adverse claimants concerning the property acquired or claimed by the receivers or trustees, as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimant. Section 23 further provides that such suits shall be brought only where the bankrupt could have sued in the absence of bankruptcy, unless the defendant otherwise consents and except as otherwise provided in specified statutory proceedings created by the Bankruptcy Act.

The Act of 1898, as originally enacted, made mutually exclusive provision, for the summary jurisdiction in bankruptcy proceedings and incidental controversies therein, on the one hand, and for jurisdiction of plenary suits involving controversies at law and in equity between the trustee and adverse parties, strangers to the proceedings, on the other hand.

Section 23 as originally enacted in 1898 provided:

> "JURISDICTION OF UNITED STATES AND STATE COURTS. (a) The United States *circuit* courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent *only as though bankruptcy proceedings had not been instituted* and such controversies had been between the bankrupts and such adverse claimants." (Italics supplied.)

Section 23(a) thus required the preexistence of federal jurisdiction under the Judicial Code. Section 23(a) merely preserved jurisdiction afforded under the Judiciary Act of 1789 as between party and party, and specified that the bankrupt was to be deemed the litigant.

Section 23 further provided:

> "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Section 23(b) did not affect the distribution of power between state and federal courts. It preserved to debtors of the bankrupt their rights to state courts but it permitted such debtors to consent to federal jurisdiction.

Ordinarily jurisdiction cannot be conferred by consent even by Act of Congress. However,

> "The Congress by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. * * * Exercising that power, the Congress prescribed in Section 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition."
>
> *Schumacher* v. *Beeler* (1934), 293 U. S. 367, 374.

Thus, Section 23(b) operates as a grant of a consent jurisdiction, which a federal court could not otherwise exercise.

Later, when the courts of bankruptcy were given a jurisdiction concurrent with that of the state courts to entertain

plenary suits under Sections 60, 67 and 70 of the Bankruptcy Act relating to fraudulent transfers and preferences, Section 23(b) was also amended by eliminating the requirement for consent in such suits. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426, 433-4. The grant of jurisdiction over the plenary suits so excepted together with the grant of federal jurisdiction in cases of the debtor's consent mark the limit of federal jurisdiction over plenary suits against adverse parties under the Bankruptcy Act. The implication from these express grants of federal plenary jurisdiction fortifies the conclusion drawn from its own terms that a grant of similar jurisdiction does not exist in Section 2 of the Bankruptcy Act.

As heretofore noted, the history of the Bankruptcy Act shows that in the Acts of 1841 and 1867 Congress provided in separate sections for the bankruptcy court's summary jurisdiction and plenary jurisdiction. The plenary jurisdiction was exercisable concurrently by the district and circuit courts. Act of 1841, Section 8, 5 Stat. 443, 446; Act of 1867, Section 2, 14 Stat. 517, 518; *Morgan* v. *Thornhill* (1870), 11 Wall. 65; *Wiswall* v. *Campbell* (1876), 93 U. S. 347; *Schumacher* v. *Beeler* (1934), 293 U. S. 367. The distinction between and separate treatment of the summary and plenary jurisdictions was not lost sight of in the Act of 1898 in enacting Sections 2 and 23 of that Act. *Bardes* v. *Hawarden First Nat. Bank* (1900), 178 U. S. 524; *Schumacher* v. *Beeler*, *supra*.

The plenary jurisdiction referred to in Section 23 of the Act of 1898 was different from that granted in the previous acts in failing to afford concurrent jurisdiction and restricting that plenary jurisdiction to the circuit court alone, and granting jurisdiction to any court, including the bankruptcy court, where the defendant consented to be sued. *Bardes* v. *Hawarden First National Bank*, *supra*; 30 Cong. Rec. 601, 55th Cong., 1st Sess. (1897). Until the circuit court was abolished in 1911 plenary suits based on state-created rights could not be brought in an ordinary district court save on consent. Only the circuit court had jurisdiction in such suits between trustees and adverse claimants without the

defendant's consent and this jurisdiction rested on and was subject to the requirements of the Judicial Code, as if bankruptcy had not intervened. During the same period the district courts, on the other hand, had original and exclusive jurisdiction of bankruptcy proceedings, exercisable summarily as well as jurisdiction on consent. The district courts as such, and not as courts of bankruptcy, have since 1911 inherited the jurisdiction formerly exercised by the circuit court. The traditional jurisdiction of district courts as courts of bankruptcy, however, is in *rem*, a summary jurisdiction. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426.

Thus the plan of the Act of 1898 was clear. Of the two federal courts, where there was no consent to suit, only the circuit court had jurisdiction of controversies at law and in equity based on state-created rights, as distinguished from proceedings in bankruptcy or rights created by the Act, between trustees and adverse parties. And it had that jurisdiction only in those cases in which federal jurisdiction otherwise existed. That jurisdiction was necessarily one enjoyed not exclusively but concurrently with the state courts. Judiciary Act of 1789; Bankruptcy Act, Section 23(a). On the other hand, the district courts as courts of bankruptcy had original and exclusive jurisdiction of bankruptcy proceedings, exercisable in summary fashion, Section 2, except the additional jurisdiction on consent.

The legislative history of the Act of 1898 shows that Section 2 was never thought of as being concerned with ordinary civil litigations. 30 Cong. Rec. 601, *et seq.*, 55th Cong., 1st Sess. (1897). The desire to restrict federal jurisdiction was clearly manifest. 31 *id.* 1785, 6433, 55th Cong., 2d Sess. (1898).

In the discussion of the bill which emerged as the Act of 1898, the Chairman of the Judiciary Committee stated as follows, 31 Cong. Rec. 1785:

> "The jurisdiction of state courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered

with * * *: Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was a great inconvenience and much expense * * *. Such will not be the effect under this bill." *

It is thus clear from the plain language of the statute, the historical and legislative background and the decided cases, that Sections 2 and 23 of the Act of 1898 refer to basically different jurisdictions and that Section 2 does not embrace this type of suit.

The respondents nevertheless contend that Section 23 was not a grant of jurisdiction but merely a limitation on Section 2, because of the "except" clause in Section 2a(7) which has been held to refer to Section 23. The bankruptcy court is granted original jurisdiction in proceedings under this title by Section 2a to—

> "(7) Cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided," * * *."

The respondent would read the "except" clause as a limitation on the jurisdiction of the district court granted under Section 2. The Circuit Court of Appeals likewise took this view on the ground that "Obviously a section which deals with jurisdiction over civil actions can be an exception to another section only if that other section also deals with jurisdiction over civil suits" (R. 147). But this statement ignores the language and plan of the Act. The language in the Act connotes, not a limitation on the sole jurisdiction conferred by Section 2a(7) but an additional grant of jurisdiction under circumstances not present in this case. The word "except" is used as a conjunction which uniformly is defined as the equivalent of the word "unless." Certainly one section dealing with the jurisdiction of the Bankruptcy

* *Cf.*, Frankfurter and Landis, The Business of the Supreme Court (1928) 63 n. 24.

Court can supplement another section which also deals with the jurisdiction of the Bankruptcy Court.

Section 2 expresses the sole jurisdiction of the bankruptcy court except as supplemented by Section 23, *i.e.*, using the language of Section 2a(7), "except [unless] as herein otherwise [further] provided [added]." The only supplemental jurisdiction was the jurisdiction in Section 23(b).*

The Circuit Court of Appeals asserted (R. 148) that "in eliminating § 23 from corporate reorganizations under Chapter X, Congress intended to enlarge" the jurisdiction of ordinary district courts to accommodate suits by trustees, irrespective of diversity or requisite amount. Two law writers are named as supporting the Court's views.** We respectfully suggest that the elimination of a statute dealing with jurisdiction was not a grant of another jurisdiction or enlargement of jurisdiction otherwise inadequate for such suits.

The court below found no basis for federal jurisdiction of this suit within the jurisdictional provisions peculiarly applicable to Chapter X. Sections 114, 118, 11 U. S. C. §§ 514, 518. It had to rest its finding of federal jurisdiction solely on Section 2 as imported into Chapter X by Section 102. The court below reasoned that because greater power of scrutiny was granted to a Chapter X trustee, Sections 165, 167, 11 U. S. C. §§ 565, 567, and because he has the duty to formulate a plan of reorganization, Section 169, 11 U. S. C. § 569, the elimination of Section 23 was intended to enlarge the scope of federal jurisdiction under Section 2 to include plenary jurisdiction to "be exercised by all the district

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* Later additions are found in Sections 60, 67 and 70. Section 23(b) was amended at the same time eliminating requirement of consent to the added jurisdiction.

** 1. One of the supporting texts referred to is as yet unpublished, viz., Professor Moore, 6 Collier on Bankruptcy, 14th Ed. § 3.20 [R. 149].

2. The other writer, Mr. Gerdes, seems to have been concerned with the different problem of clarifying the equity receivership powers of the reorganization court. His view seems to have been that Section 23(b) impeded the receivership powers of the trustee. 2 Gerdes on Corporate Reorganization, p. 1478. The C. C. A. 3 Cir. held otherwise as to comparable provisions in former Sec. 77-B of the Bankruptcy Act in *In re Standard Gas & Electric Corp.*, 119 F. 2d 658; as did also the C. C. A. 7 Cir. in *In re Prima Co.*, 98 F. 2d 952, cert. den. 305 U. S. 658. *Cf. Warder v. Brady* (C. C. A. 4 Cir.), 115 F. 2d 89.

courts, and not solely by the one in which the bankruptcy or reorganization petition was originally filed" (R. 147).

There is nothing in the legislative history of the 1938 additions to the Act of 1898 (Chapter X) to show any intention of Congress to enlarge the scope of federal jurisdiction. The nation-wide property jurisdiction of the domiciliary court over property of the debtor was a modification of venue requirements and not a grant of a new federal jurisdiction, Section 111. 11 U. S. C. § 511.

The concern of Congress in enacting the Act of 1898 had been to limit and restrict the scope of federal jurisdiction. No evidence appears in the legislative history that deviation from that attitude was intended in 1938 or that the distribution of power over state-created rights as between state and federal courts generally, was being realigned. As the District Judge aptly observed (R. 135), more would seem to be required than Section 102 to accomplish so great a change in a jurisdictional provision. Such far reaching jurisdiction "should be sought in the language of the statute, and should not be based on a far-fetched inference" (R. 135).*

Section 23 was obviously irrelevant to the purposes of Chapter X. The concern of Chapter X is with "proceedings" to reorganize the debtor. On the other hand, Section 23 is not concerned with administration of property nor proceedings to reorganize the debtor; it, as part of the Bankruptcy Act proper, is concerned with liquidation. It was because of these differences in purpose and not to enlarge the jurisdiction of the federal court that Section 23 was specifically designated as one of the sections of the Bankruptcy Act not incorporated in Chapter X.

The plan of Chapter X was to give the trustee powers necessary to effect reorganization in the domiciliary court by "proceedings," Section 114, and to give him power to deal in that court with matters *in personam* in his capacity

* No mention of the supposed expansion of jurisdiction is made in a comprehensive article dealing with the important procedural changes effected by the Chandler Act. *Douglas, Improvement in Federal Procedure for Corporate Reorganization* (1938) 24 A. B. A. J. 875.

as an equity receiver, Section 115. If reorganization efforts fail and liquidation is ordered, the trustee is given an additional aid for liquidation by the grant of jurisdiction under Section 23.

A Chapter X trustee has no need for greater access to federal courts to collect debts than that accorded to a bankruptcy trustee. The prime function of a bankruptcy trustee is to liquidate, collect and distribute. The reorganization trustee's purpose is not primarily liquidation but to maintain the *status quo* and to realign interests. Federal jurisdiction over suits on state-created rights would confer no advantage on the trustee. *Cf. Erie* v. *Tompkins* (1938), 304 U. S. 64.

D. The construction of the Act adopted by the Circuit Court of Appeals would divest the state courts of jurisdiction.

We do not contest the power of Congress to create the jurisdiction sought by the respondents. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426. We have attempted to show that Congress has not exercised any such power. One more point in support of our thesis is that since jurisdiction under 2a(7) is exclusive in the bankruptcy courts and exclusively federal, Judicial Code, Section 256, amended "Sixth," 28 U. S. C. § 371, amended "Sixth"; *Pepper* v. *Litton* (1939), 308 U. S. 295, 304; *United States Fidelity & G. Co.* v. *Bray* (1912), 225 U. S. 205, 217, the state courts are excluded from entertaining a similar jurisdiction. Nevertheless, the claims in this case are traditionally and unquestionably cognizable by the state courts. See *Brown* v. *Gerdes* (1944), 321 U. S. 178, 185-6; *Hastings* v. *Bylesby & Co.* (1941), 286 N. Y. 468; *Kidder* v. *Horrobin* (1878), 72 N. Y. 159.

In reliance on the interpretations of this Court, innumerable suits must have been maintained in the state courts, the judgments in which will be voided if this Court does not follow its earlier rulings in the *Bardes* and *Schumacher* cases. The issues presented by such plenary suits turn basically on state-created rights. Congress intended to make no

such inroads; as those suggested by the respondents, on the jurisdiction of the state courts. See 31 Cong. Rec. 1785, *supra*, pp. 22-3.

E. Jurisdiction does not exist under Section 115 of the Act.

The respondents have suggested that jurisdiction exists under Section 115 of the Bankruptcy Act, 11 U. S. C. § 515. This point was advisedly not strongly urged below and was not considered in the opinion of the Circuit Court of Appeals.

The jurisdiction, powers and duties of a reorganization court are defined in Section 114 of the Bankruptcy Act, 11 U. S. C. § 514, to be the same as in a bankruptcy proceeding on adjudication, where not inconsistent with the provisions of Chapter X. Section 114 reads:

> "Section 114. Upon the approval of a petition, the jurisdiction, powers and duties of *the court* and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a *bankruptcy proceeding* upon adjudication." (Italics supplied.)

Since this is not a proceeding under Chapter X and the jurisdiction of this court is not to be found in Chapter X it necessarily follows that the power of the respondents as trustees to sue in this court is not to be found in Chapter X. The power conferred on an officer can be no greater than the power of his appointing court.

Section 115 of the Bankruptcy Act, 11 U. S. C. § 515, gives the domiciliary court "powers" additional to those granted by Section 114, as follows:

> "Section 115. Upon the approval of a petition, *the court* shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature." (Italics supplied.)

There can be no doubt that this additional grant of power is in favor of the domiciliary court. In the preceding section relating to jurisdiction as well as in Section 115 the court referred to is the court in which the petition is filed or to be approved. The definitions in the Act dispel all doubt on this point.

> "'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending." Section 1(9), 11 U. S. C. § 1(9).

This definition is incorporated in Chapter X, Section 102, 11 U. S. C. § 502.

The grant of equity receivership powers to the reorganization court may have been deemed by some in Congress to be inconsistent with Section 23(b). Some law writers* and courts thought the inconsistency existed because of the power of an equity receiver as distinguished from a trustee in bankruptcy to litigate plenary claims in his home court, irrespective of diversity. This power followed from the equity court's property jurisdiction and control. This presumed inconsistency with Section 115 may have been a reason for eliminating Section 23 from Chapter X. But surely Section 23 was not thought by the Congress to be inconsistent with Section 2; both sections had been in the same statute for 40 years.

While, indeed, Chapter X accords equity receivership powers to the domiciliary court, the Court's trustee-receiver was not thereby granted access by reason of his office to other district courts generally, nor were the limits of jurisdiction of such other courts thereby broadened.

An equity receiver was never afforded access to federal courts other than the domiciliary court, merely by reason of his office, for the purpose of bringing plenary suits *in personam*.

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* See footnote **2, p. 24, *supra*.

Gableman v. *Peoria D. & E.* (1900), 179 U. S. 335;
Barfield v. *Zenith T. & R.* (N. D. Ohio, 1924), 9 F. (2d) 204;
Kelley v. *Queeney* (W. D. N. Y. 1941), 41 F. Supp. 1015.

The respondents contend that, in effect, they are acting as receivers in an ancillary suit in New York, and, though no property in the possession of the debtor or in the control of the court is involved in this suit, that jurisdiction exists regardless of the citizenship of the parties or the absence of any other ground for federal jurisdiction. This Court pointed out in *Mitchell* v. *Maurer* (1934), 293 U. S. 237, 243, that it had never squarely decided the issue, though "In Raphael v. Trask, 194 U. S. 272, it is intimated that the jurisdiction of the federal court cannot be based upon an original suit in another federal court."

The federal courts, however, have spelled out the proper criteria to be followed. Ancillary jurisdiction exists in the district court in which the receivership proceedings are pending. *White* v. *Ewing* (1895), 159 U. S. 36. And in our analysis, ancillary jurisdiction exists in another federal court, only if property of the debtor is located within and is the basis of the ancillary court's jurisdiction. Receivership is a function related to control of property. But, absent a property jurisdiction, there can be no ancillary jurisdiction in one federal court based on the jurisdiction of another federal court. See *Raphael* v. *Trask* (1904), 194 U. S. 272, *Kelley* v. *Queeney* (W. D. N. Y., 1941), 41 F. Supp. 1015, and *Winter* v. *Swinburne* (C. C. E. D. Wisc., 1881), 8 F. 49, for a discussion of this rule. See also *Lesnik* v. *Public Industrial Corp.* (C. C. A. 2, 1944), 144 F. (2d) 968, 976, n. 11.

POINT II.

JURISDICTION DOES NOT EXIST UNDER SECTION 24(1) OF THE JUDICIAL CODE.

The respondents' complaint alleges that jurisdiction exists under Section 24(1) of the Judicial Code, 28 U. S. C.

§ 41(1). There is no allegation of diversity of citizenship of the parties. Accordingly, to establish jurisdiction under the Judicial Code, respondents must show that a federal question is involved or that the suit has been brought by the United States or its officers.

A. There is no federal question involved in this case.

"* * * the mere fact that plaintiff was a trustee in bankruptcy did not give jurisdiction." *Spencer* v. *Duplan Silk Co.* (1903), 191 U. S. 526, 531; *Gableman* v. *Peoria B. & E.* (1900), 179 U. S. 335; *Pope* v. *Louisville, N. A. & C. Co.* (1889), 173 U. S. 573.

Mr. Justice Cardozo, on behalf of this Court, stated succinctly and poignantly the tests of the presence of a federal question. *Gully* v. *First National Bank* (1936), 299 U. S. 109, 112-13:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U. S. 248, 257; *First Nat. Bank* v. *Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid.*; *Kings County* v. *Seattle School Dist.*, 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Joy* v. *St. Louis*, 201 U. S. 332; *Denver* v. *New York Trust Co.*, 229 U. S. 123), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74. Indeed, the

complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, *supra*."

See also,

Spencer v. *Duplan Silk Co.* (1903), 191 U. S. 526, at 530.

The respondents meet none of the foregoing tests. Merely because a controversy arises out of or is incidental to a bankruptcy does not make it a federal question.

In this case the claimed violation of fiduciary duty is neither condemned by the Constitution nor by federal statute; the fact that the plaintiffs are trustees is not an essential element on which the result will turn nor is it a ground of federal jurisdiction. The causes of action, if any there be, were claims which the corporation or its stockholders could assert independently of bankruptcy and without reference to or reliance on the Constitution or federal laws. Accordingly, no federal question is involved.

B. Respondents are not officers of the United States.

The respondents have urged in the courts below that because they are "officers" of the reorganization court, and the reorganization court is a federal court, they are "officers" of the United States within the meaning of Section 24(1) of the Judicial Code, 28 U. S. C. § 41(1):

> "The district court shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue. * * *."

No one seems to have advanced the respondents' very novel proposition heretofore and citation of specific authority to

the contrary is difficult to assert. It is clear, however, that bankruptcy receivers are not officers of the United States. See *Gablemgn* v. *Peoria D. & E. R. Co.* (1900), 179 U. S. 335; *Pope* v. *Louisville, N. A. & C. Co.* (1889), 173 U. S. 513; *cf. Fleming* v. *Bowers* (S. D. N. Y., 1926), 11 F. (2d) 789.

It is plain that the United States is not suing the petitioners. The respondents, as trustees under Chapter X, are not United States Government officials, nor are they protecting any governmental interests. There are no interests of the United States at stake in this case.

It seems evident to us from a mere reading of the language of the statute that what was contemplated by the term "officer" was an officer acting *on behalf of* the United States to carry out a function that Congress has declared to be *a function of government.*

Respondents offer no rationale, but simply rely on the cases holding that a receiver of a national bank is an "officer" of the United States. *E.g., Pufahl* v. *Estate of Parks* (1936), 299 U. S. 217, 225; *Price* v. *Abbott* (D. Mass., 1883), 17 Fed. 506. But the receiver of a national bank is acting on behalf of the United States and is carrying out a function that Congress has said the government should execute. When a national bank is placed in receivership "the Comptroller of Currency [is] in possession of the business." *Jennings* v. *U. S. F. & G. Co.* (1935), 294 U. S. 216, 218. "But a receiver is appointed only when the condition of the bank or its practices make *intervention by the government* necessary for the protection of noteholders or other creditors." Mr. Justice Brandeis, in *United States* v. *Weitzel* (1918), 246 U. S. 533, 541. (Emphasis added.)

Congress has decided that where the condition of a national bank or the manner in which it is conducted demands the removal from power of the management in order to protect the interests of noteholders or other creditors, the Government should take over the management of the bank. And it has determined that the Comptroller of the Currency should be the one to act on behalf of the Government with the assistance of an agent, termed a "receiver." Congress

has not determined that where the condition of a corporation is such as to necessitate reorganization or bankruptcy proceedings the United States should intervene.* It has, under its bankruptcy powers, afforded a judicial forum in which such proceedings may take place, and it has authorized that forum to appoint a person to manage the business of the debtor during the proceedings. But by so doing it did not erase the distinction between officers of the United States and officers of the court: a receiver for a national bank is an officer of the United States, a trustee in bankruptcy is an officer of the court. *In re Chetwood* (1897), 165 U. S. 443, 457; *Porter* v. *Sabin* (1893), 149 U. S. 473, 479; *Wheeler* v. *Greene* (1929), 280 U. S. 49, 51; *Oosterhuis* v. *Palmer* (C. C. A. 2d, 1943), 137 F. (2d) 322, 325; *Lawrence National Bank* v. *Rice* (C. C. A. 10th, 1936), 83 F. (2d) 642, 643; *Lehman* v. *Spurway* (C. C. A. 5th, 1932), 58 F. (2d) 227, 228; *Davis* v. *McFarland* (C. C. A. 5th, 1926), 15 F. (2d) 612, 613; *Wittnebel* v. *Loughman* (S. D. N. Y., 1935), 9 F. Supp. 465, 467, aff'd 80 F. (2d) 222, cert. den. 297 U. S. 716.

The very cases on which the respondents have relied emphasize this distinction, *e.g.*, Mr. Justice Brandeis in *United States* v. *Weitzel* (1918), 246 U. S. 533, 540-41:

> "The Comptroller of the Currency is charged with the duty of supervising national banks. When he deems it necessary to take possession of the assets of the bank and assume control of its operations he appoints a receiver under Rev. Stats., § 5234.
>
> * * * * *
>
> "The receiver, unlike a president, director, cashier or teller, is an officer not of the corporation but of the United States. *In re Chetwood*, 165 U. S. 443, 458. As such he gives to the United States a bond for the faithful discharge of his duties; he pays to the Treasurer of the United States the money collected; and makes to the Comptroller reports of his acts and proceedings. Rev. Stats., § 5234. Being an officer of the

* The Securities and Exchange Commission is authorized to participate for certain purposes in the reorganization proceedings, but not in suits such as this. Bankruptcy Act, Section 172; 11 U. S. C. § 572. The trustees are not officials of the SEC.

> United States he is represented in the court by the United States attorney for the district subject to the supervision of the Solicitor of the Treasury, § 380. *Gibson* v. *Peters*, 150 U. S. 342. * * *."

See also,

Kennedy v. *Gibson* (1869), 8 Wall. 498, 504-505.

We do not, of course, assert that the United States must have a proprietary interest in the outcome of the litigation in order for jurisdiction to exist under Section 24(1); we do contend that its officers must be asserting either a proprietary right or a regulatory function of the government as dictated by Congress. Whether this regulatory function be entrusted by Congress to the Secretary of the Treasury, the Secretary of the Interior or any other government official, a receivership as an incident thereto is protection of a national interest under government authority and such a receiver becomes an officer of the executive branch of the United States Government. And we contend further that no such governmental interest exists in this case; and jurisdiction may not be based on Section 24(1) of the Judicial Code. Any ruling contrary to these views would result in opening a new field of federal jurisdiction more significant than any grant by Congress in over half a century. Specific congressional language should be required for such a result.

POINT III.

THE JUDGMENT BELOW SHOULD BE REVERSED.

There is no legislative basis for federal jurisdiction of this case. The presumed nature of the conduct of the petitioners developed *ex parte* and allegedly giving rise to this suit is mentioned in the opposing briefs as though that might aid a finding of jurisdiction. Self-evidently, the characterization of the conduct has no bearing on the issue of jurisdiction.

Considerations of policy urged by the respondents as desirable cannot enlarge the congressional grant of jurisdiction to the court nor be a substitute for legislative act. Section 2 of the Bankruptcy Act of 1898 has been repeatedly and uniformly construed by the courts and is not ambiguous. The only relevance of arguments of policy can be to suggest what Congress might do or might have done. If jurisdiction is conferred by statute, the argument of what is desirable policy is superfluous. If jurisdiction has been withheld by Congress, such contentions amount merely to a criticism of congressional wisdom.

In *Price* v. *Gurney* (1945), 324 U. S. 100, the plaintiff failed to meet the legislative requirements for jurisdiction prescribed by Chapter X of the Bankruptcy Act. He urged that considerations of federal policy would be served best and meritorious claims would be enforced if the court nevertheless accepted jurisdiction. Mr. Justice Douglas (who, as an SEC Commissioner, urged the need of Chapter X), expressed sympathy for the plaintiff's position, but found no legislative basis for jurisdiction and so concluded:

> "The creation of a new basis of Federal jurisdiction * * * is a legislative act" (p. 107).

There is no affirmative policy to enlarge federal jurisdiction to which this court has subscribed as intimated by the respondents and the *amicus curiae*. The policy is rather to leave state issues to state courts.

If there is any basis in fact for this suit, the state court is the proper forum.

> "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice."

Lathrop v. *Drake* (1875), 91 U. S. 516, 518.

The state courts afford an adequate forum for such suits. *Hastings* v. *Byllesby & Co.* (1941), 286 N. Y. 468.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The BANKRUPTCY ACT OF 1898, as amended, provides:

Sec. 1(9); 52 Stat. 840; 11 U. S. C. § 1(9)

"MEANING OF WORDS AND PHRASES.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * *;

"(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; * * *"

Secs. 2a and 2a(7); 52 Stat. 842; 11 U. S. C. §§ 11(a) and 11a(7)

"CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to— * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *"

Sec. 23; 52 Stat. 854; 11 U. S. C. § 46

"JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have juris-

diction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in §§ 60, 67, and 70 of this Act."

Sec. 101; 52 Stat. 883; 11 U. S. C. § 501

"The provisions of this chapter shall apply exclusively to proceedings under this chapter."

Sec. 102; 52 Stat. 883; 11 U. S. C. § 502

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That § 23, subdivisions h and n of § 57, § 64, and subdivision f of § 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under § 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

Sec. 111; 52 Stat. 884; 11 U. S. C. § 511

"Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Sec. 114; 52 Stat. 884; 11 U. S. C. § 514

"Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication."

Sec. 115; 52 Stat. 884; 11 U. S. C. § 515

"Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties herein and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

The JUDICIAL CODE, as amended, provides:

Sec. 24(1) (in part); 36 Stat. 1091; 28 U. S. C. § 41(1) (in part)

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, * * * ".

Sec. 24(19); 36 Stat. 1093; 28 U. S. C § 41(19)

"The district courts shall have original jurisdiction as follows:

"Nineteenth. Of all matters and proceedings in bankruptcy."

Sec. 256(Sixth); 36 Stat. 1161; 28 U. S. C. § 371 (Sixth)

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *

"Sixth. Of all matters and proceedings in bankruptcy."